

UTAH SCHOOL LAW UPDATE

Utah State Office of Education

May 2008

Inside this issue:

UPPAC Case of the Month Eye On Legislation Recent Education 3 Cases

Your Questions 3



UPPAC CASES

- The Utah State Board of Education reinstated the license of Michele Opheikens.
- The State Board permanently revoked the license of Lawson Rashad Sweat for engaging in sexual relationships with two female students.
- The Board suspended Barbara Louise Talbot's license for one year. The suspension results from Talbot's "double billing" two public school employers.
- The Board suspended Wesley Riches' educator license for two years based on his use of a school computer to access sexually inappropriate materials.
- The Board suspended Richard Kautz' license for one year based on his guilty plea to disorderly conduct.

UPPAC DECISION-MAKING

Members of the State Board of Education asked the Utah Professional Practices Advisory Commission to prepare a rubric for its decisions about licensing sanctions. Educators may also be interested in learning how UP-PAC makes the decisions that are sent to the State Board and, if approved, end up in the right hand corner of this publication.

The first consideration for the Commission is the type of allegation. Viewing pornography at school almost always leads to a license suspension, casual testing practices may not.

As the Commission looks at the allegation, it next considers if there is any direct evidence of the misconduct. If a teacher is accused of inappropriately touching a student but there are no witnesses to the event and the student won't testify, there is little the Commission can do. It must have at least some direct evidence of wrongdoing in order to recommend a license suspension or revocation.

If there is evidence, the Commission must weigh that evidence. This means determining if the witnesses are credible, if there is physical evidence such as computer logs, and questioning whether there is a valid explanation for the evidence that argues against the allegation of misconduct.

The Commission also considers the extent to which students were involved. A teacher who views pornography on his school computer late at night may receive a two-year suspension of his license. A teacher who does so during the day and is witnessed by a student will lose his license for a longer period.

Similarly, the Commission typically recommends a longer suspension or revocation for educators whose conduct disrupts the educational process. For instance, if a teacher's attempt to develop a sexual relationship with a student was obvious to other students and caused the others to fear or ridicule the teacher, the Commission may recommend a longer term suspension or revocation.

Long term behavior or long ago behavior also affects the outcome. An educator who has a long history of making sexually inappropriate comments to students will face greater sanctions than one who made a one-time mistake. An educator whose misconduct occurred 20 years

ago may receive a lighter sanction than one who committed her bad acts last month.

Likewise, an educator who has repeatedly been warned about his behavior, will find the Commission less sympathetic to his cause.

An educator facing criminal sanctions will also find the Commission more amenable to suspension or revocation of the license. Often, the Commission will recommend that a suspension track any court-ordered probation or plea in abeyance term.

The accused educator's credibility also plays a role. The Commission looks for signs that the educator recognizes the seriousness of the problem and is actively seeking to overcome the underlying issues that led to the behavior.

Other mitigating and aggravating circumstances, of course, play a role in the Commission's recommendations, as does the educator's cooperativeness with the investigation and willingness to negotiate the terms of a suspension.

Each UPPAC case is very fact specific, but these underlying considerations influence the outcome in all cases.

Eye On Legislation

From the National Association of State Boards of Education comes this synopsis of a move we might see coming through the Utah Legislature in the near future:

VERMONT SENATE PLOWS
AHEAD WITH ED GOVERNANCE OVERHAUL — Over the objections of nearly all of the state's education constituencies [emphasis added], the Vermont State Senate approved legislation this week to disband the 10-member state board of education and give the governor the power to appoint the state commissioner of education.

The vote was 17-12. An amendment that would have spared the state board of education but allowed the governor to select the chief was defeated. The measure now moves to the state House of Representatives for consideration. Proponents of the changes argue

that the increases in student achievement have been insufficient and that eliminating the state board will help streamline operations, improve cross-agency coordination, and increase accountability on the governor.



Opponents, such as Senate Minority Leader Bill Doyle, counter that "education in Vermont is a lot better

than it gets credit for" and that a "paper change" is hardly the answer to the problems legislators are trying to address.

Indeed . . . , Doyle noted that "the Board of Education and the commissioner have plans for transforming the state's education system and creating a 21st Century learning environment...In a number of key

categories, Vermont students have compared very well with their national peers, but the Vermont state board understands, as do state boards of education through the country, the status quo can never be sufficient in the arena of public education." Source: *Times Argus* (4/9/08); *Burlington Free Press* (4/8/08).

Meanwhile, back on the home front, the Utah Legislature included education governance (with a separate focus on school district governance) on its Master Study Resolution from the 2008 legislative session. Expect ideas similar to Vermont's to be bandied about during the next several months and the 2009 session.

The debate may be stymied, however, if there are enough changes in legislative seats during the Nov. 2008 elections.

UPPAC Case of the Month

Kids, especially high school kids, can be a flirtatious group. And many will flirt with a teacher or two, if allowed. The key, for teachers who do not want to appear before the Utah Professional Practices Commission, is to make it clear to students that they are not the kinds of teachers who will flirt with students.

To assist teachers with creating a non-flirting environment, we offer this handy guide of "what not to say" to students (as always, these examples come from real cases—we can't make this stuff up:

- 1. I'll give you \$100 to show me your _____.
- 2. Let me tell you about the crazy party I went to where a woman drank too much and did

- 3. If I were younger/not married/not your teacher I would date you.
- 4. Can I give you a kiss on your 18th birthday?
- 5. Let me tell you how to please your boyfriend/girlfriend.
- 6. Let me teach you how to please your boyfriend/girlfriend.
- 7. I want to see your tattoo, too.
- 8. Why don't you email me some pictures of yourself?
- 9. Let me take you to lunch to say thank you.
- 10. Don't you think _____ (student) has a great body?
- 11. Have you seen what ____is

wearing today? She looks hot. You could wear that.

- 12. I'd love to squeeze your pecs.
- 13. Let's see how tight your abs are.
- 14. You are so flexible. I love to watch you move.
- 15. What color underwear are you wearing today?

Any of the above, or any variations of the above, may lead to discipline against an educator's license. Combinations of the above over a period of time or regularly addressed to one student, or made to several students, will lead to suspension of the educator's license.

Utah State Office of Education Page 2

Recent Education Cases

This month's cases focus on religion in school.

Borden v. School District (3rd Cir. 2008). The Third Circuit Court of Appeals ruled that a football coach with a 23-year history of prayer activities with his high school team could be prohibited from joining in student-led prayer activities.

The coach brought the lawsuit over a district policy that prohibited educators from participating in student-initiated prayer. The coach wanted to engage in the silent acts of bowing his head during the grace said at pre-game meals and taking a knee during pre-game prayers in the locker room.

Borden argued that the district policy violated his constitutional rights of free speech, freedom of association, and due process.

The district court agreed with Borden, finding the policy unconstitutional and holding that his silent acts would not violate the Establishment Clause.

The circuit court disagreed. It found that Borden did not have a First Amendment right to bow his head or take a knee during prayer activities since these acts are not speech on a matter of public concern.

Further, Borden's conduct over the past 23 years violated the Establishment Clause. This history, per the court, "leads to a reasonable inference that his current requested conduct is meant `to preserve a state-sponsored religious practice' of praying with his team prior to games." Borden's current, silent actions, are a part of this tradition of violating the constitution.

Thus, the court noted that, while students can engage in prayer before the game, the coach may not manifest his approval or solidarity with the religious activity at a school-sponsored event or on school time.

Wilkerson v. New Media Technology Charter School (3rd Cir. 2008). The employee claimed unlawful religious discrimination against the charter school for, among other things, failing to accommodate her religious beliefs.

Wilkerson, a Christian minister, was required to attend a school banquet. Before the banquet, there was a ceremony described simply as "libations" which Wilkerson perceived as requiring ancestor worship in place of worshipping God.

Wilkerson did not object to the ceremony at the time, nor did she excuse herself. She did complain at a later staff meeting. When she was terminated at the end of the year, she alleged that the school terminated her rather than accommodating her beliefs.

On this point, the Third Circuit court disagreed. It found no evidence that Wilkerson sought an accommodation and, therefore, she was not denied accommodation by the school.

Morrison v. Bd. of Ed., (6th Cir. 2008). Morrison, a student, sued the school board for "chilling" his First Amendment speech rights.

Morrison was a Christian student who believed homosexuality is a sin and that he has a duty to tell others when they are not comporting with his understanding of morality. The Board has a policy prohibiting students from making stigmatizing or insulting remarks based on sexual orientation. Morrison remained silent about his personal beliefs, but challenged the Board's right to stifle his speech.

The court declined to find any injury where Morrison chose not to speak based on his own assumptions (without any concrete, prior action on the part of the Board) that he would be punished for speaking.

Your Questions

Q: When we receive lost cell phones, the secretary will either look in the "my files" to determine who owns the phone, or call the last number on the phone to see who it belongs to. Is this okay?

A: Perhaps, but proceed with caution. The school needs to be careful about viewing too much on the phone without reasonable suspicion. While a school employee who receives a lost phone has a legitimate reason to look for owner information, the employee

What do you do when. . . ?

does not have grounds to "rummage" through files on the phone, including text messages, photos, or any other files beyond the owner info or last call received.

Q: As graduation approaches, we have many seniors with unpaid fees. Can we hold their diplomas

until the fee is paid?

A: A school may NOT withhold a student's official transcripts or earned diploma for the non-payment of fees.

The school can, however, prevent a student from walking in the graduation ceremony, withhold graduation honors or activities, withhold UN-official transcripts, or send the unpaid fees to a collection agency for payment, or ask the student to assist with the prom cleanup crew, among other op-

Utah State Office of Education

Utah State Office of Education

250 East 500 South P.O. Box 144200 Salt Lake City, Utah 84114-4200

Phone: 801-538-7830 Fax: 801-538-7768 Email: jean.hill@schools.utah.gov





The Utah Professional Practices Advisory Commission, as an advisory commission to the Utah State Board of Education, sets standards of professional performance, competence and ethical conduct for persons holding licenses issued by the Board.

The Government and Legislative Relations Section at the Utah State Office of provides information, direction and support to school districts, other state agencies, teachers and the general public on current legal issues, public education law, educator discipline, professional standards, and legislation.

Our website also provides information such as Board and UPPAC rules, model forms, reporting forms for alleged educator misconduct, curriculum guides, licensing information, NCLB information, statistical information about Utah schools and districts and links to each department at the state office.

Your Questions Cont.

(Continued from page 3) tions.

Q: My ex-wife has taken our 16-year old out of school. She did not consult with me about this decision and the school did not notify me of the withdrawal. Do I have any legal recourse against the school for allowing my ex to do this without my consent?

A: No. Per Utah law, a school can determine that the parent who has the majority of the time with the student is the primary custodian. Once that determination is made, the school need only seek that parent's consent on educational decisions.

If the divorce decree provided that both parents would be involved in education issues, and the ex-wife did not consult with the other parent, the parent's recourse is with the divorce court, not the school.

Q: An 18-year old senior has asked the school not to send his transcripts to his home address or to provide his parents with any information about his grades and attendance. Since he is 18 and is thus an "eligible student" under the federal Family Educational Rights and Privacy Act (FERPA) must we honor his request?

A: Only if he is completely independent of his parents and no longer declared on their taxes.

While students 18-years old and older have FERPA rights, the parents do not lose their rights simply because their children have birthdays. As long as a child is still a dependant for federal tax purposes,

the parents maintain their FERPA rights as well.

Thus, the parents have the right to review the student's education records and determine if he is attending and completing all of his assignments.

Q: We have heard a lot about the numerous candidates for the State Board. Has Gov. Huntsman selected the final candidates yet?

A: No. The Nominating Committee must forward the names of the candidates it determines "possess outstanding professional qualifications" to the governor by July 1. The governor must then select two candidates for each seat and send those names to the lieutenant governor by Aug. 1 for placement on the ballot.